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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CARMELLA DeSEAN,

Petitioner/Respondent,

v.

ISAIAH SANGER,

Respondent/Appellant.

Brief of Respondent

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I. INTRODUCTION

This case asks this Court to decide if affirmative defenses under RCW 9A.44.030 apply to sexual assault protection order matters under RCW 7.90. The Washington State Legislature specifically created the Sexual Assault Protection Order Act (“SAPOA”) to give survivors of sexual assault a way to protect themselves from future interactions with their offender, even when the assault is not reported or is not prosecuted. RCW 7.90.005. Sexual assault is the most heinous crime committed against another person short of murder and inflicts humiliation, degradation, and terror on victims. *Id.*

Here, the trial court found that neither RCW 7.90 or *Nelson v. Duvall* set forth the availability of affirmative defenses for respondents in SAPOA actions. CP 122. It further ruled that Ms. Carmella DeSean lacked the capacity to consent to sexual contact due to her high level of intoxication, and, therefore, she established by a preponderance of the evidence that the penetration was nonconsensual. *Id.* Ms. DeSean asks this Court to deny Mr. Sanger’s Appeal and affirm the trial court’s ruling granting her a yearlong Sexual Assault Protection Order (“SAPO”).

II. COUNTER STATEMENT OF ISSUES

A. The trial court did not err when it granted Ms. DeSean's Petition for a Sexual Assault Protection Order.

1. The trial court did not err in its finding that Ms. DeSean lacked the capacity to consent to sexual contact or sexual penetration due to her high level of intoxication.
2. The trial court did not err when it found that there are no affirmative defenses available to a respondent in a Sexual Assault Protection Order proceeding.
3. The trial court did not err when it denied Mr. Sanger's Motion for Reconsideration of its decision to grant Ms. DeSean's Petition.
4. The trial court did err when it found that there was 8 ounces of alcohol in each drink prepared by Mr. Duncan; however, such error did not materially affect the court's decision or prejudice Mr. Sanger.

III. STATEMENT OF THE CASE

On August 7, 2020, Mr. Isaiah Sanger sexually assaulted Ms. Carmella DeSean. CP 1-6, 42-44, 58, 120-123, 177-179; RP 9, 66, 70. The parties met only 24 hours before the assault took place. RP 7, 9, 55. Ms. DeSean traveled to Nevada to visit Mr. Bailey Duncan. CP 4. Mr. Sanger and Mr. Duncan were roommates and on August 7th, the night of the assault, only three people were present: Ms. DeSean, Mr. Sanger, and Mr. Duncan. CP 27-29, 42-43.

Ms. DeSean is petite standing at 5'3" and weighing 128 pounds. RP 60. She has many allergies including being allergic to some alcohols, so she does not drink alcohol often and when she does her drink of choice is wine.

CP 36, 42, 57; RP 60-61. The morning of August 7th, Ms. DeSean ate eggs for breakfast. RP 56. She ate nothing for lunch that day and one piece of chicken for dinner. *Id.* Mr. Duncan, Ms. Desean, and Mr. Sanger ate dinner together and then drank alcoholic beverages while socializing around the pool. CP 39; RP 33, 57.

That night Ms. Desean consumed three alcoholic beverages. CP 39, 42; RP 33-34, 57, 69. The first two were made by Mr. Duncan and contained tequila, which he hand-poured, and estimated that an eighth of each 20 ounce drink was liquor. CP 39, 42; RP 33-34, 57-58. Mr. Sanger made the third drink and mixed an unknown amount of vodka and tequila in the 20 ounce drink. CP 39, 42, 89; RP 34, 58-59. Shortly after consuming the third drink, Ms. Desean blacked out and only remembers bits and pieces of the rest of the night. CP 4, 42; RP 61, 69-70.

After Ms. DeSean drank the third beverage, Mr. Duncan witnessed Ms. DeSean stumbling up the stairs and requiring assistance with walking. RP 36. He also witnessed her crying and hovering over the toilet dry heaving. *Id.* Mr. Sanger admits that Ms. DeSean vomited and became upset or emotional numerous times. CP 91, 94. A friend of Ms. DeSean's, Ms. Gabriella Bloom, believed Ms. DeSean was intoxicated based on pictures sent earlier in the evening where Ms. DeSean's eyes looked heavy and glossy. CP 58. Ms. Bloom became concerned about Ms. DeSean's

wellbeing after Ms. DeSean said that she had drank too much, did not feel well, and just stopped messaging Ms. Bloom between 7:00 p.m. and 9:00 p.m. *Id.*

Most importantly, Mr. Duncan believed Ms. DeSean to be highly intoxicated later in the evening. CP 40; RP 36-37. Mr. Duncan, a male larger in stature than Ms. DeSean, admittedly drank less alcohol than Ms. DeSean on the night of August 7th. RP 33-36, 38. However, he became ill after drinking and fell asleep on the couch downstairs, while Mr. Sanger took care of Ms. DeSean upstairs because she also was not feeling well. CP 39, 91; RP 33. Mr. Sanger declared that on the night of August 7th Mr. Duncan was “quite drunk,” “rather drunk,” “sloppy,” and “sick.” CP 90-91.

Later in the evening Mr. Sanger left Ms. DeSean upstairs and woke Mr. Duncan to ask him if they “were good” before falling asleep on another couch downstairs. CP 40; RP 36, 96. Mr. Duncan immediately went upstairs where he found Ms. DeSean in his bed. *Id.* She did not respond to him when he spoke to her, so he had to turn on the light and shake her awake. CP 40; RP 36-37. Even then she was not able to keep her eyes open or speak coherently. *Id.*

Ms. DeSean woke up on August 8th in pain and bruised; her neck, knees, arms, back, coccyx area, and hips were sore. CP 4, 28; RP 8, 65. She had a lump on her head in addition to a headache and general confusion. *Id.*

She could smell sex and condoms, and she was bleeding from her vagina, which hurt. CP 4, 28; RP 7, 65. Ms. DeSean could recall only three “flashback” memories of the night before, including that she told Mr. Sanger “no” to kissing her, “no” to a threesome, and “no” to having sex. RP 7-8, 62-64.

Ms. DeSean and Mr. Sanger spoke on August 8th, and Ms. DeSean learned that Mr. Sanger sexually penetrated her the night before. CP 4-5, 97-98; RP 65-66. Ms. DeSean had no memory of the events that he described from the night before, including the sexual assault. RP 69-70. Mr. Sanger was the only person who had any recollection of the assault. CP 7-18, 87-102.

At first, Mr. Sanger told Ms. DeSean that he did not know if sexual penetration had occurred the night before when she asked. CP 97; RP 65. He then told her that they “must have had sex last night because there were two condoms on top of the garbage.” *Id.* He also told Mr. Duncan that he “can’t remember much,” “only bits and pieces” of what happened. CP 20, 48. Until he finally said that “he fucked [Ms. DeSean] up against the wall.” CP 4; RP 8, 66.

On the afternoon of Monday, August 10, 2020, Ms. DeSean went to the hospital and reported that she had been raped. CP 27; RP 67. Law enforcement was contacted and responded to the hospital where Ms.

DeSean underwent a sexual assault examination. CP 27. Ms. DeSean was not able to leave the hospital until about 12:00 a.m. or 1:00 a.m. RP 67, 69. By the time Ms. DeSean spoke with Detective Skinner that night she had already told her account of the assault to approximately eight other people. RP 67. She was not offered food, had limited water during that time, and was forced to wait in a hospital room by herself. *Id.* Detective Skinner testified that she only spoke to Mr. Duncan for an estimated 10 to 15 minutes and learned from him that he did not see an assault occur and that he had been drinking alcohol. RP 85-87. Based on that information, she did not inquire as to whether he saw Ms. DeSean drink alcohol or her intoxication level. RP 108-109. Detective Skinner also testified that she did not obtain a statement from Mr. Sanger regarding the events that occurred on August 7th. RP 98.

Mr. Sanger never told Detective Skinner any of the facts surrounding the night of August 7th. CP 30; RP 98. He requested a copy of Detective Skinner's incident report, and then filed over 20 pages of details in his declarations to the Court dated September 9, 2020, and October 12, 2020, in response to Ms. DeSean's Petition. CP 7-18, 87-102. Mr. Sanger's own account of events outlined in his declarations is that he asked for Ms. DeSean's permission to engage in consensual sexual penetration multiple times. CP 91-94. He also alleged that he asked Ms. DeSean multiple times

if she knew that she had been the one to kiss him and initiate contact. CP 92, 94. Mr. Sanger said he was concerned by statements she was making and he wanted to make sure that she understood that he was not taking advantage of her. CP 94. Mr. Sanger admitted he continued sexually penetrating Ms. DeSean in spite of his concerns while making sure to engage in a conversation to determine if Ms. DeSean understood what was happening. He did all of this while fully knowing that she had been drinking alcohol that night. *Id.*

Ms. DeSean filed the Petition for a Sexual Assault Protection Order on August 31, 2020. CP 1. Mr. Sanger requested a full evidentiary hearing. RP 17. At the beginning of the full evidentiary hearing on December 11, 2020, Ms. DeSean's Counsel requested that there be no cross-examination of the parties. RP 28. Mr. Sanger's counsel did not object and the Court ruled that there would be no cross-examination of the parties. *Id.* After Ms. DeSean testified, Mr. Sanger's Counsel requested to cross-examine her. RP 70. The Court allowed Mr. Sanger's Counsel to cross-examine Ms. DeSean. RP 71-75.

After the full evidentiary hearing, the trial court found that Ms. DeSean lacked the capacity to consent to sexual contact due to her high level of intoxication and therefore found that Ms. DeSean established by a preponderance of the evidence that the penetration was nonconsensual. CP

120-122. The Court entered a one-year protection order. CP 124-127. Mr. Sanger filed a Motion for Reconsideration on December 28, 2020. CP 128-161. The trial court denied the Motion for Reconsideration on January 11, 2021. CP 177-179.

IV. ARGUMENT

A trial court's decision to grant or deny a protection order is reviewed for abuse of discretion. *In re Vulnerable Adult Petition for Knight*, 178 Wn. App. 929, 936-37, 317 P.3d 1068 (2014). Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or exercised on untenable grounds, or in other words, if the trial court adopts a view no reasonable person would take or applies the wrong legal standard or relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). The reviewing court defers to the trial court on the persuasiveness of the evidence, witness credibility and conflicting testimony, while questions of law and statutory interpretation are reviewed de novo. *Salas*, 168 Wn.2d at 669, 230 P.3d 583; *Pham v. Corbett*, 187 Wn. App. 816, 831, 351 P.3d 214 (2015).

A. The trial court relied on substantial evidence when it concluded that Ms. DeSean did not have the capacity to consent to sexual activity and granted Ms. DeSean’s Petition.

1. The trial court was correct when it found that Ms. DeSean did not have the capacity to consent to sexual activity on August 7, 2020, and thus she was sexually assaulted.

To obtain a sexual assault protection order, a petitioner must prove by a preponderance of the evidence that they are the victim of nonconsensual sexual conduct or nonconsensual sexual penetration. RCW 7.90.090(1)(a). When proving “nonconsensual”, it is a prerequisite of consent that the petitioner have the capacity to consent. *See Nelson v. Duvall*, 197 Wn. App 441, 387 P.3d 1158 (2017). Accordingly, where there is evidence the petitioner consumed excessive alcohol or suffered other impairment, the trial court has an obligation to determine the petitioner’s capacity and enter a finding of such. *Id.*

RCW 7.90 defines “nonconsensual” as lack of freely given agreement. In *Nelson*, the plain language of the word “freely” required a finding “that the victim was acting of his/her own accord, free from external control, willingly, voluntarily, knowingly, and consciously.” *Nelson*, 197 Wn. App at 453. Therefore, being incapacitated due to intoxication, whether voluntarily or involuntarily, would necessarily have an adverse effect on a person's ability to act with free will and of his or her own accord. *Id.*

When seeking a SAPO that bases lack of consent on incapacity, a petitioner must prove his or her incapacity by a preponderance of the evidence. *Id.* at 460. In *Nelson*, the trial court was directed to consider all the evidence before it, including seven case specific factual findings when determining if the petitioner was incapable of consent due to mental incapacity. In essence, the trial court was told to evaluate all of the evidence in the record and make a decision on the totality of the circumstances when determining whether the petitioner was incapacitated.

The court must consider whether a "condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4). In this case, this includes but is not limited to evidence that (1) Nelson consumed a significant quantity of alcohol throughout the evening and became highly intoxicated, (2) Nelson's memory started fading in and out to the point that she did not remember much of the evening, (3) Nelson's friend was concerned that she had been intoxicated and questioned her ability to walk home, (4) Nelson insisted on walking home by herself across campus around 2 a.m. in January-- alone--demonstrating she may not have meaningfully understood the consequences of her actions, (5) Nelson apparently fell hard enough to rip her jeans and hurt her knee in the process of running home but did not remember the fall, (6) Nelson's Snapchats were incoherent enough to worry her boyfriend, and (7) Nelson neglected to follow through on her promise to text her friend once she arrived at her dorm. After considering all of this evidence, the trial court must determine whether Nelson carried her burden of proving "nonconsensual sexual penetration" and either grant or deny the sexual assault protection order.

Nelson at 457-458.

In this case, there was substantial evidence in the record to meet the preponderance standard that Mr. Sanger assaulted Ms. DeSean. Mr. Sanger has never contested that sexual penetration took place. His own testimony and account of the events that occurred the night of August 7, 2020, shows that Ms. DeSean was incapacitated at the time of the assault due to excessive intoxication. First, Mr. Sanger observed Ms. DeSean drink alcohol throughout the evening. CP 89. He then witnessed her become upset before Ms. DeSean told Mr. Sanger that she was not feeling well and vomited. CP 91.

During the assault, Mr. Sanger asked Ms. DeSean for her permission to continue or if she was “OK” with what was happening three different times that night. CP 91-93. Mr. Sanger also asked Ms. DeSean if she knew what had happened multiple times. CP 91-93. First, he asked her if she knew that she had kissed him. CP 92. Then he “told her she knew” he was not taking advantage of her. CP 94. He also told her “she knew she initiated everything.” *Id.* Mr. Sanger became concerned by the statements Ms. DeSean was making and again “asked her if she knew that she had started kissing [him] and that she was also the one that got on top of [him] and started having sex with [him].” *Id.* During the course of the conversation,

Mr. Sanger again observed Ms. DeSean become emotional. *Id.* Even though Mr. Sanger thought it was necessary to clarify with Ms. DeSean multiple times that she wanted to engage in sex and to reinforce that he did not initiate the encounter because he had doubts as to her understanding of who she was kissing, he continued to engage in the nonconsensual sexual penetration of her. CP 94-95.

The next morning, Mr. Sanger again tried to persuade Ms. DeSean that the night before was consensual, or in his own words “tried to make sure she was okay and that she knew that everything [they’d] done was consensual.” CP 98.

Mr. Sanger argues that “blacking out” or losing memory is not indicative of incapacity, and he offers alternative explanations for Ms. DeSean’s memory loss. However, the memory loss in addition to all of the other evidence concerning Ms. DeSean’s physical and mental state the night of August 7th is consistent with a highly intoxicated person and proves that is it more likely than not that Ms. DeSean was incapacitated.

Mr. Sanger’s own testimony proves that he knew Ms. DeSean lacked capacity to consent and did not understand what was going on. Mr. Sanger observed Ms. DeSean drinking, he was present when she became emotional, and watched her cry and even vomit during the course of the night. CP 89, 91. During the assault, he asked her more than once if she

knew that she had kissed him. CP 92. According to him, he asked multiple times if she consented to sex during the encounter. CP 92-94. He even felt the need to tell her that she did in fact know that he was not taking advantage of her. CP 92. Mr. Sanger's observations of Ms. DeSean drinking and her behavior that night coupled with his asking those questions, repeatedly, as well as his telling Ms. DeSean that she initiated the sexual activity shows both his awareness that Ms. DeSean was too intoxicated to consent and his attempt to substitute his judgment for hers. This scenario demonstrates the significance and purpose of the doctrine of incapacity as laid out in *Nelson*. A person who is incapacitated does not have the ability to consent and their words or conduct suggesting consent does not constitute consent or excuse the respondent's behavior.

Contrary to Mr. Sanger's argument, his self-serving and uncorroborated¹ statements that Ms. DeSean requested the use of condoms does not equate to having capacity. First, when a petitioner has proven that they were incapacitated at the time of the act, their words or conduct indicating consent to sexual contact do not excuse the respondent's conduct. *Nelson* at 455. Second, the *Nelson* Court was clear that the lower court was

¹ Ms. DeSean told Detective Skinner that she found unused condoms in the upstairs bathroom the day after the assault and that she believed she was getting a urinary tract infection from the assault. CP 29.

to consider all of the evidence and make a decision on the totality of the circumstances. Here the trial court considered the testimony of all the witnesses, which consistently showed that Ms. DeSean was highly intoxicated and had very limited memories of what happened that night. Mr. Sanger's own statements show that he had concerns about Ms. DeSean's capacity at the same time he told the Court she was the one to request they use condoms. The Court considered all of this information when it determined that based on the totality of the evidence before it Ms. DeSean was too incapacitated to consent to sexual contact regardless of any conduct or statements Mr. Sanger argues shows Ms. DeSean had capacity that night.

Lastly, in addition to Mr. Sanger's account, Ms. DeSean's and Mr. Duncan's testimonies assert that Ms. DeSean drank three beverages with an unknown amount of mixed liquor. RP 33-34, 57, 69. Similar to the facts in *Nelson*, Ms. DeSean blacked out after drinking the three beverages with only having three "flashback" memories of the night the next morning. RP 61, 69-70. Even more serious than the facts in *Nelson*, Mr. Duncan observed Ms. DeSean stumbling, requiring assistance with walking, crying, and dry heaving over the toilet. RP 36. He then found her later in the evening in his bed where he had to shake her awake and observed her unable to speak coherently. RP 36-37. Another witness, Gabriella Bloom, saw pictures of

Ms. DeSean via Snapchat the night of the assault and observed Ms. DeSean's eyes to be heavy and glossy. CP 58. The next morning, Ms. DeSean woke up in pain including a headache, she felt sick to her stomach, and again vomited, which lasted for days. RP 8, 65. All facts that are clearly signs of a person who was highly intoxicated and did not have the capacity to consent to sexual conduct or sexual penetration.

In short, the trial court's findings that Ms. DeSean was incapacitated and therefore could not consent to any sexual contact with Mr. Sanger on August 7th is supported by substantial evidence in the record. Since Mr. Sanger agreed that he sexually penetrated Ms. DeSean, once the Court found Ms. DeSean lacked the capacity to consent, it follows that the Court had to find that a sexual assault took place.

2. The trial court's conclusion that Ms. DeSean was incapacitated and could not consent is not affected by its erroneous finding that Ms. DeSean consumed 8 ounces of Tequila in each drink Mr. Duncan made.

A trial court's findings of fact are reviewed for substantial evidence. *Blackburn v. State*, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016) (citations omitted). Substantial evidence means there is enough evidence "to persuade a rational, fair-minded person of the truth of the finding." *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007) (quoting *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004)). Even if a trial court

relies on erroneous or unsupported findings of fact, immaterial findings that do not affect its conclusions of law are not prejudicial and do not warrant reversal.” *State v. Coleman*, 6 Wn. App. 2d 507, 516, 431 P.3d 514 (2018) (citations omitted).

The trial court incorrectly found that the first two drinks Ms. DeSean consumed contained eight ounces of alcohol each. However, this error is immaterial, and the court’s finding that she lacked the capacity to consent to sex was based on substantial evidence regardless of this error.

Preliminarily, the specific amount of alcohol that Ms. DeSean consumed on the night of the assault is immaterial because there is no per se limit of alcohol consumption that proves a person lacks consent. *See* RCW 7.90, et seq. As an example, this is in clear contrast with the criminal DUI statute, which does provide that a blood or breath alcohol content above a certain level is a per se violation of the law. RCW 46.61.502(1)(a). The actual issue at hand is whether the alcohol Ms. DeSean consumed affected her capacity to the point where she no longer had the ability to consent to sexual conduct or sexual penetration. *See Nelson*, 197 Wn. App. at 453.

Here, there was considerable evidence offered that Ms. DeSean consumed alcohol to the point of lacking capacity to consent to sex, without the court needing to make a finding about the specific amount of alcohol

she consumed. First, Mr. Sanger, Ms. DeSean, and Mr. Duncan all testified that Ms. DeSean had three drinks that evening. CP 39, 42; RP 33-34, 57, 69. Mr. Sanger himself admitted that he did not know how much alcohol was in her third drink, which he mixed. CP 34, 57-58. Mr. Duncan estimated that there was about 2.5 ounces of alcohol in each of the drinks that he made that night. CP 39, 42; RP 33-34, 57-58

Next, Mr. Duncan, Ms. DeSean and Mr. Sanger testified that her behavior showed she was intoxicated. Ms. DeSean stumbled, needed assistance walking up the stairs, became emotional, cried, said she did not feel well, and vomited. CP 39-40, 91, 94; RP 36-37. Mr. Sanger assaulted Ms. DeSean in the bathroom where she had gone to vomit. CP 91. Mr. Duncan concluded that Ms. DeSean was highly intoxicated that night after finding her passed out and unable to open her eyes or speak coherently. CP 40; RP 36-37. Ms. DeSean's friends who saw her snapchat messages that night noted that she had heavy, glossy eyes and also concluded that she was intoxicated. CP 58. Ultimately, Ms. DeSean blacked out because of the alcohol that she consumed that night. CP 4, 42; RP 61, 69-70.

The court's conclusion that Ms. DeSean was too intoxicated to consent was based on substantial evidence regardless of the court's error about the amount of alcohol in the drinks Mr. Duncan mixed. Moreover, that conclusion did not rely on the specific amount of alcohol Ms. DeSean

consumed. First, Mr. Duncan testified that he was estimating how much alcohol was in the drinks he mixed, and, second, Mr. Sanger did not know how much alcohol he put into Ms. DeSean's third drink. While the court did overstate the amount of alcohol Mr. Duncan mixed in Ms. DeSean's drinks, that conclusion does not change that Ms. DeSean consumed a considerable, though unknown, amount of alcohol as her behavior demonstrated. The court's incorrect calculation is immaterial to the court's findings that Ms. DeSean did not have the capacity to consent.

In conclusion, Mr. Sanger's appeal should be denied on this issue and the trial court's protection order should remain in place.

B. The trial court was correct in concluding that affirmative defenses provided under RCW 9A.44.030 do not apply in protection order proceedings under RCW 7.90.

1. The SAPOA would lose its integrity and its purpose to protect sexual assault survivors if respondents were able to raise affirmative defenses.

Nelson v. Duvall is the first case to address whether “nonconsensual” means the survivor has the capacity to consent. 197 Wn. App. at 453. Since the SAPOA does not directly address whether “nonconsensual” requires that the survivor have the capacity to consent, the court looked to the definitions in chapter 9A.44 RCW, as both chapters focus on sexual assault and rape. The *Nelson* court determined that the SAPOA *terms* should be read in harmony with chapter 9A.44 RCW. *Nelson*

at 454 (citing *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 19 P.3d 540 (2001)) (emphasis added). Webster's Dictionary defines "terms" as "a word or expression that has a precise meaning in some uses or is peculiar to a science, art, profession, or subject". Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/terms> (last visited July 3, 2021). Contrary to Mr. Sanger's argument, *Nelson* did not hold that all relevant criminal statutes are to be applied under the SAPOA, but instead borrowed definitions. Mr. Sanger's sweeping mischaracterization of *Nelson* would blur the critical differences between criminal and civil laws that were designed for separate purposes.

First, the SAPOA was created to provide survivors with a quick and efficient process to obtain a protection order against future interactions with their assailants when survivors choose not to report the assault or do report the assault but it is not prosecuted. RCW 7.90.005. This is in clear contrast to the criminal code, which was created "to forbid and prevent conduct that inflicts or threatens substantial harm to individuals or public interests". RCW 9A.04.020. It would defeat the legislature's intent in creating the SAPOA, for a court to determine that a sexual assault did in fact occur, but a protection order should not be entered because the respondent believed the petitioner was not incapacitated. Creating affirmative defenses in civil

proceedings where the SAPOA is silent would leave victims with no remedy in civil law, which was clearly not the intent of the legislature.

Second, the SAPOA and criminal code were created independently of each other and requiring the laws to be read as one would compromise both statutes' integrity. Statutory construction requires that the integrity of the statutes be maintained when read in harmony. *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974). As one example, the statutes have very different burdens of proof showing that the statutes are intended to be applied differently. In criminal cases the State must prove its case beyond a reasonable doubt, whereas a petitioner must prove the assault by a preponderance of the evidence under the SAPOA. RCW 9A.04.100; 7.90.090(1)(a). Likewise, if the legislature intended for the criminal code's affirmative defenses to apply in the SAPOA, then it would have been reflected in the statute's plain language, as the SAPOA was written after the criminal code.

Finally, the affirmative defense of reasonable belief in criminal cases is a way for criminal defendants to offer an excuse for their criminal conduct and prevent the State from curtailing their liberty as punishment. *See State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010) (citations omitted). This is much different than the point of a civil case, which is to address the petitioner's harm. It is important to remember that defendants in criminal

cases are faced with losing their fundamental liberties. A person must be able to defend against the State's case when the person's liberty is at stake. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). This is distinct from a civil case where a respondent's loss of liberty is much smaller, and a petitioner cannot request the court sentence a person to incarceration.

This case is a civil case meant to protect Ms. DeSean, not punish Mr. Sanger. The court granted the petition for one year, and ordered Mr. Sanger to not contact Ms. DeSean, or go within a certain distance of her person, home, school, and workplace. This loss of liberty is minor in comparison to what would happen to Mr. Sanger if he was convicted in a criminal court based on his conduct. Moreover, this remedy is specifically designed to protect Ms. DeSean and fulfill the purpose of the SAPOA. Whether Mr. Sanger reasonably believed Ms. DeSean had capacity does not change the fact that Ms. DeSean was, in fact and by law, incapacitated and could not consent. As such, she is entitled to seek protection with a SAPO petition, which fulfills the purpose of the SAPOA. If Mr. Sanger were given leave to raise an affirmative defense this would hamper Ms. DeSean's ability to protect herself, and weaken the purpose of the SAPOA.

2. Even if Mr. Sanger were given leave to argue he reasonably believed Ms. DeSean had the capacity to consent and therefore did not assault her, there is insufficient evidence to prove his defense.

While there is nothing in the law that entitles Mr. Sanger to present an affirmative defense that he reasonably believed Ms. DeSean had the capacity to consent, Mr. Sanger's argument fails based on the evidence in the record. Mr. Sanger's own account proves he knew Ms. DeSean lacked capacity to consent and did not understand what was going on. He asked her, more than once, if she knew that she had kissed him, that she had initiated the contact with him, and that he was not taking advantage of her. CP 91-94. There is a difference between asking for someone's consent to engage and continuously asking someone if they know and understand what is happening in the moment. Mr. Sanger should have stopped all sexual contact the moment he doubted Ms. DeSean's ability to understand what was going on, especially when he became concerned that she may have thought he was taking advantage of her.

Mr. Sanger alleges that in those moments Ms. DeSean said she understood and consented to continuing. He also stated that he did not believe her to be incapacitated because she could talk and was not stumbling. However, Mr. Sanger's account of events is incongruent with the plethora of evidence regarding Ms. DeSean's state and appearance that evening. Mr. Duncan testified to observing Ms. DeSean stumbling, crying

because she did not feel well, and dry heaving over the toilet. RP 36. Later in the night, Mr. Duncan found Ms. DeSean passed out, unable to open her eyes or speak coherently. RP 36-37. Mr. Sanger himself admitted that Ms. DeSean became upset or emotional multiple times and he witnessed her vomit. CP 91, 94. Notably, Mr. Sanger presented evidence to the Court that he is a trained paramedic and has received multiple briefings in the military about sexual consent. CP 96. However, even the average person would have known that Ms. DeSean was incapacitated based on her crying, stumbling, dry heaving, vomiting, and becoming emotional. Mr. Sanger's "belief" that Ms. DeSean was not mentally incapacitated was unreasonable, particularly given his specialized knowledge. Thus, the court's decision to grant Ms. DeSean's Petition because she was incapacitated and could not consent was correct based on the law, and the facts.

C. Mr. Sanger's due process rights were not violated because he was able to cross examine Ms. DeSean, and the trial court's limitation of that cross-examination was within its sound discretion.

1. There is no constitutional right to cross-examine the petitioner in a SAPOA hearing.

The constitutional right of confrontation is explicitly limited to criminal prosecutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. Abd-Rahmaan*, 154 Wn.2d 280, 288, 111 P.3d 1157 (2005); *Chmela v. Dep't of Motor Vehicles*, 88 Wn.2d 385, 392, 561 P.2d 1085 (1977).

Looking to Domestic Violence Protection Orders (herein “DVPO”)² there is no right for petitioners or respondents to cross-examine witnesses who have submitted declarations as part of the DVPO hearing process, though the trial court may find in its discretion that testimony and cross-examination at the hearing is necessary to protect a respondent’s due process right. *Gourley v. Gourley*, 158 Wn.2d 460, 470, 145 P.3d 1185 (2006). It follows that in SAPOs—which are not criminal proceedings—there is no constitutional right to cross-examine a petitioner.

As a result, Mr. Sanger does not have a constitutional right to confront Ms. DeSean in this proceeding. Furthermore, the criminal caselaw cited by Mr. Sanger in support of his argument is not applicable because it deals with the constitutional right to confront an accuser in the criminal setting. Mr. Sanger’s appeal on this issue should be denied because it is not supported in law.

2. Mr. Sanger’s due process rights were not violated because he was given the opportunity to cross-examine Ms. DeSean.

While there is no constitutional right to confront the petitioner in a SAPOA proceeding, the trial court may find that due process necessitates

² SAPOs were specifically created to afford a remedy to those victims who did not qualify for DVPOs. RCW 7.90.005. Both are protection orders and exempt from the rules of evidence. *See* ER 1101(c)(4). While created by separate legislation to protect different types of victims, SAPOs and DVPOs have functionally identical procedures. Consequently, caselaw on the rights of the parties in a DVPO is highly persuasive as to the rights of the parties in a SAPO.

such an examination. “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrison v. State Dep't of Lab. & Indus.*, 168 Wn. App. 269, 272–73, 277 P.3d 675 (2012) citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Often this interest is satisfied when a person is afforded the “opportunity to be heard at a meaningful time in a meaningful manner.” *Gourley*, 158 Wn. at 460. “Determining what process is due in a given situation requires consideration of (1) the private interest involved, (2) the risk that the current procedures will erroneously deprive a party of that interest, and (3) the governmental interest involved.” *Morrison*, 168 Wn. at 269 citing *Mathews*, 424 U.S. at 334–35, 96 S.Ct. 893.

Here, Mr. Sanger argues that his future livelihood may be deprived because of the protection order, which was granted when he was not able to fully cross-examine Ms. DeSean. First, he offered no evidence that his current career will be affected, and he offered no evidence that the one-year protection order will prevent him from pursuing a career after that year has run. This unsubstantiated future interest must be balanced against the State’s compelling interest in offering sexual assault victims a civil remedy to ensure their safety. RCW 7.90.005; *Nelson v. Duvall*, 197 Wn. App. at 451. Consequently, the question is whether the Court’s limitation of the

cross-examination of Ms. DeSean erroneously deprived Mr. Sanger of a possible future interest.

At the beginning of the evidentiary hearing on December 11, 2020, Ms. DeSean's Counsel requested that there be no cross-examination of the parties, and Mr. Sanger's Counsel did not object but deferred to the Court's discretion. RP 28. The Court instructed that it would consider the testimony presented that day as supplemental evidence to all of the evidence already filed via pleadings, and ruled that there would be no cross-examination of the parties. RP 28-29. After Ms. DeSean testified on direct, Mr. Sanger's Counsel inquired into cross-examining Ms. DeSean. RP 70. In opposition to Ms. DeSean's position, the Court then ruled that Ms. DeSean could be cross-examined, but only as to new evidence that was presented about saying "no". RP 71-72. However, the Court allowed Mr. Sanger's Counsel broad leave to cross-examine Ms. DeSean. Mr. Sanger's counsel asked questions about Ms. DeSean's conversations with Detective Skinner, that she engaged in sexual intercourse with Mr. Duncan, and the timeline that led to her reporting the assault. RP 72-75. After this testimony, Ms. DeSean's Counsel objected to a question that was outside the scope. RP 75. The Court sustained the objection, at which point Mr. Sanger's Counsel informed the Court that she did not have any further questions. 72-75.

The Court's limitations did not erroneously deprive Mr. Sanger of his interest in a future career when balanced against the State's compelling interest. He was able to offer ample evidence through declaration in response to Ms. DeSean's petition, he requested a full hearing with testimony be held, and the Court granted that request; and he was given the opportunity to cross-examine Ms. DeSean as to the new evidence offered at the hearing. In short, Mr. Sanger's due process rights were not violated by the court's decision to limit cross-examination, and his appeal should be denied.

V. CONCLUSION

Ms. DeSean asks this Court to find that the trial court did not abuse its discretion when it found that Ms. DeSean was incapacitated and could not consent to sexual contact, thereby ruling that a sexual assault did occur and entering a one-year sexual assault protection order. Ms. DeSean asks this Court to affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 16th day of July 2021.

NORTHWEST JUSTICE PROJECT

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the
RESPONDENT’S BRIEF with the Clerk of the Court using the electronic
filing system, which will send notification of filing and downloadable copy
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EXECUTED this 16th day of July, 2021 at Spokane, WA.

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